

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

TAMMY KITZMILLER, et al., : CASE NO.
Plaintiffs : 4:04-CV-02688
vs. :
DOVER AREA SCHOOL DISTRICT, : Harrisburg, PA
Defendant : 21 December 2004
..... : 1:10 p.m.

TRANSCRIPT OF SCHEDULING CONFERENCE
BEFORE THE HONORABLE JOHN E. JOHNS, III
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

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HARRISBURG, PA

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ORIGINAL

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P R O C E E D I N G S

1
2 THE COURT: Be seated, please. All right,
3 good afternoon to everyone. This is the matter
4 of Tammy Kitzmiller and other plaintiffs versus
5 the Dover Area School District. It is a
6 complaint that has been filed, and the court
7 has set this time for a status conference based
8 in the nature of the action, and I'll get into
9 that in a little bit of detail shortly, but at
10 this point why don't we have counsel enter their
11 appearances, starting with counsel for the
12 plaintiffs, and then following, obviously,
13 counsel for the defendants.

14 MR. HARVEY: Good afternoon, Your Honor.
15 I'm Steve Harvey, with Pepper Hamilton in
16 Philadelphia. Pleasure to be here.

17 THE COURT: Good afternoon to you.

18 MR. HARVEY: With me I have my colleague
19 Tom Schmidt, who's a partner in our Harrisburg
20 office of Pepper Hamilton.

21 THE COURT: Good afternoon to you.

22 MR. HARVEY: And Paula Knudsen of the ACLU.

23 MS. KNUDSEN: Good afternoon.

24 THE COURT: Good afternoon to you.

25 MR. HARVEY: And for your information,

1 we also have some of the plaintiffs in the
2 courtroom, and I could name them for you if
3 you would like.

4 THE COURT: We can get to that.

5 MR. HARVEY: Very well, Your Honor, thank
6 you.

7 THE COURT: Let's do that as we need to.
8 We welcome you, certainly. And for the
9 defendants?

10 MR. MUISE: Good afternoon, Your Honor.
11 Robert Muise, from the Thomas More Law Center.
12 I represent the defendants, the Dover Area
13 School District and the Dover Area School
14 District board of directors. Also with me at
15 counsel table is Mr. Richard Thompson, an
16 attorney with Thomas More Law Center, and
17 Mr. Ron Turo, who is our local associate
18 counsel, and sitting with counsel at table
19 Dr. Richard Nilsen, the superintendent, and
20 Ms. Sheila Harkins, the board president of the
21 Dover Area School District.

22 THE COURT: Good afternoon to all of you
23 as well, and we thank you for attending. As I
24 noted given the nature of this matter, I thought
25 in an effort to do several things, not the least

1 of which is to clarify where we're heading, it
2 would be well to have a conference on the
3 record, and predominantly what I'd like to do
4 is discuss with the parties, and I recognize
5 that defendant's counsel in particular are very
6 recently in the mix so to speak, so I'm not at
7 all in a position, or do I want to put you in a
8 position, where we delve substantially into the
9 merits of this action.

10 But more than that what I want to do is
11 talk about where we're going. From the
12 plaintiffs' perspective, you've requested
13 several things, among them a declaratory
14 judgment and relief under Rule 65, obviously
15 in the form of an injunction. Let me ask
16 plaintiffs' counsel, is it your intention
17 to seek some preliminary relief?

18 MR. HARVEY: Your Honor, anticipating that
19 this was the subject that Your Honor wanted to
20 discuss, I've given it some thought and I
21 contacted my colleagues on the other side about
22 this subject. Because they're so new we spoke
23 by phone yesterday, I told them what the issue
24 was, but we didn't have chance to talk about it
25 until just prior to the hearing. And what I

1 said to them is subject to what I wanted to tell
2 the court, which is that we are, we believe, or
3 we're under the impression that this policy is
4 going to be implemented in January. Then it's
5 going to be implemented again sometime in the
6 spring.

7 Now, I've just learned from counsel that
8 it's going to be implemented on or about January
9 13th, and then it's going to come up again in
10 late June. And so my first, what I said was the
11 plaintiffs' preferred position here would be for
12 the defendants agree not to implement the policy
13 in January, and then we could work out a
14 schedule for a preliminary injunction hearing
15 prior to the time that it's going to be
16 implemented in June. That would give us, you
17 know, time for any discovery, a briefing, a
18 hearing, time for Your Honor to consider the
19 matter and write an opinion.

20 THE COURT: Well, under those circumstances
21 we may not even need a preliminary injunction
22 hearing. It seems like we could hear the case
23 on the merits in that intervening period.

24 MR. HARVEY: That may very well be the case,
25 Your Honor, and we wouldn't foreclose that

1 possibility.

2 THE COURT: That's an option.

3 MR. HARVEY: We might be able to get that
4 all done, you're right. And if we were unable
5 to get that all done, obviously under Rule 65
6 you can consolidate the hearing on the merits
7 of whatever your heard at the preliminary
8 injunction hearing. So that wouldn't be a
9 problem. Now, I just learned from Mr. Muise
10 that I think I understand that that's not
11 acceptable in terms of January, that they do
12 intend to implement the policy in January.

13 And so that leaves us with a choice of
14 whether we move for a temporary restraining
15 order or not, and we haven't decided, we'll need
16 to confer with the remainder of our counsel. We
17 reserve the right to take some discovery in the
18 interim, some limited discovery to learn more
19 exactly about what's going to happen here, and
20 then to make a decision about a TRO.

21 Their answer would be due on January 3rd,
22 and I would think that we would have to be in
23 here very shortly after January 3rd telling the
24 court whether or not we wanted to be heard on a
25 TRO hearing. And then, putting that aside, I

1 still think we can proceed on that schedule that
2 I just mentioned to you. We don't I believe
3 need to work all that out right now. I think we
4 could work that out among counsel an agreed
5 schedule and then present it to Your Honor for
6 approval with respect to how we litigate this
7 matter between now and when the issue comes up
8 in May, and then we'd leave here with an open
9 issue of what's going to happen on January 13th
10 when they're going to present that, because as I
11 said we have to be shortly in here shortly after
12 January 3rd to tell you about that.

13 MR. MUISE: Your Honor, counsel is correct
14 that the school district intends to implement
15 the policy as written. But really the question
16 that I had for opposing counsel is what it is
17 they're seeking to enjoin, because the policy
18 even as they alleged which is going to take
19 place on the 13th consists of teaching the state
20 required standard on evolution. So that's going
21 to be taught over a two-day period, 13th and
22 14th.

23 Intelligent design is not going to be
24 taught. Creationism is not going to be taught.
25 Religion is not going to be taught as part of

1 the science class. This book which they
2 apparently object to is going to be sitting in
3 the library for the students to look at if they
4 want to. So in the question I pose to counsel,
5 are you seeking to enjoin to prevent the
6 teaching of evolution over those two days?
7 So it's really, it's not clear in terms of when
8 you look at the complaint, our answer is due on
9 the 3rd --

10 THE COURT: No, I understand. What we're
11 doing is we're lapsing into the merits, to
12 disagree, and I understand -- and so that I'm
13 clear, I am not accepting as fact that which is
14 alleged in the plaintiff's complaint. Nor am I
15 accepting your version, which is that nothing is
16 going to be taught. That's not our purpose
17 here. I'm assuming that the answer I would get
18 back from the plaintiffs is that they believe,
19 as stated in their complaint, that something is
20 going to be taught that is objectionable and in
21 fact a violation of the Constitution.

22 But we're going to get off track. At this
23 point the first part of your response is that
24 however you may cast it, is that from your
25 perspective, your clients' perspective, that the

1 board intends to proceed as planned with the
2 policy, however it may be characterized. And
3 is the operative date, can we agree on the
4 operative date as being January 13th? Is that
5 much --

6 MR. MUISE: My opinion, Your Honor, that's
7 the earliest that it would be implemented, so
8 that would be a date.

9 THE COURT: Okay.

10 MR. MUISE: And with regard to the, you
11 know, the necessity to move so quickly to either
12 do a TRO preliminary injunction hearing, I'll
13 note that if you look at the complaint, there's
14 only one plaintiff that this may even have any
15 implications with, and that's the Kitzmiller
16 child. None of the other plaintiffs will
17 actually even this year have, even the June
18 session will not be confronted with this policy.
19 It's only in the ninth grade.

20 THE COURT: Isn't one enough?

21 MR. MUISE: My point being though, Your
22 Honor, is one enough in terms of getting this
23 emergency relief, the child can opt out of
24 whatever portion that they believe is
25 objectionable. It's always been a policy of the

1 board that if there's something controversial,
2 they can opt out of it. So that way we don't
3 have to rush so quickly as plaintiff's attorney
4 wanted to do, because this is really going to be
5 I think an important issue to get resolved and
6 to have proper briefing.

7 As the court noted, we came on last
8 evening, at 7:00 p.m. we were appointed. Our
9 answer is due the 3rd. I had asked if counsel
10 would grant an extension. They weren't willing
11 to because of the 13th date, but I think that
12 13th date, I think we can have in place where
13 this one, it's the one child that's implicated,
14 the child can opt out of whatever portion that
15 they believe the policy is going to be that's
16 going to be problematic, and then there isn't
17 any urgency, the greatest urgency would
18 potentially be next fall, and that would give
19 time to get discovery, the proper briefing,
20 perhaps give us an extension.

21 Because we're not even certain right now
22 we're trying to, we may file a motion to
23 dismiss. Certainly there's some standing issues
24 that we believe, and so even the January 3rd
25 date, we would have more time from the January

1 3rd, I think we can work around having to deal
2 with the immediacy of this. We're not going to
3 engage in self-censorship as a school district.
4 We're not going to remove books from out of
5 library as we understand that they are concerned
6 about. And so I think there is a way we can
7 reasonably move forward in this case and get
8 the merits brought before the court, fully
9 briefed, full discovery, without trying to move
10 as quickly as I think plaintiffs' attorney
11 potentially wants to do.

12 MR. HARVEY: Your Honor, one plaintiff
13 is enough, and excusing that child from the
14 classroom we don't believe would be a
15 constitutionally or a lawfully permissible
16 option here, much as in the way of I believe
17 in the area of school prayer, you couldn't have
18 only have the objecting students excused from
19 the classroom. So that's not an answer. We'd
20 be happy not to move on, you know, to have --

21 THE COURT: Is that because this is a facial
22 challenge?

23 MR. HARVEY: Your Honor, it's facial and
24 as applied, Your Honor.

25 THE COURT: At least in part facial.

1 MR. HARVEY: Exactly.

2 THE COURT: Is that why you can't abide
3 removing, accepting the defendants' version
4 as true that one student may be impacted on
5 January 13th, you can't abide the removal of
6 that one student from that setting? That's
7 not acceptable to the plaintiffs?

8 MR. HARVEY: Your Honor, I would want to
9 confer before making a decision on that, but
10 I believe that that would be, you know, my
11 preliminary thinking is that would be
12 objectionable.

13 THE COURT: All right.

14 MR. HARVEY: You know, if we, if they're not
15 willing to stand down on this and we have to
16 make our decision before as I said before or
17 after the 3rd, and that was the option that
18 they're presenting us with, in that context I'd
19 have to decide, we'd have to decide whether
20 we're going to move for a TRO.

21 THE COURT: So you haven't determined at
22 this point whether or not you want to move
23 for a TRO?

24 MR. HARVEY: That is correct, Your Honor.
25 We have not determined that. We're not, you

1 know, we allege about the policy that's going
2 to be implemented, but you know, we thought we'd
3 hear more and learn more. It's I don't believe
4 crystal clear exactly what's going to happen
5 here with respect to this policy. For example,
6 what happens if the student asks what is
7 intelligent design, what is handed to people,
8 how are the teachers supposed to respond to
9 that? There's a number of questions I could
10 come up with.

11 But we'd like to learn more about what they
12 intend to do and then make a decision about a
13 TRO in the short-run. And as I said, I'd be
14 happy to, we'd love to grant them the extension,
15 in fact I was going to offer that, but not if
16 we're forced to make a decision before January
17 13th.

18 THE COURT: Are you suggesting that you want
19 to do some immediate discovery in aid of the
20 determination of whether or not you're going to
21 request a TRO?

22 MR. HARVEY: Yes, Your Honor.

23 THE COURT: What's your position on that?

24 MR. MUISE: Your Honor, our position is that
25 the policy is as it states, and I don't think

1 there's any additional discovery that's going to
2 be necessary. He's got a facial challenge --

3 THE COURT: Well, he can -- wait, wait.

4 MR. MUISE: I understand.

5 THE COURT: It's not additional discovery.

6 He's entitled to some discovery. Right?

7 MR. MUISE: Absolutely, Your Honor.

8 THE COURT: So it's your position that he
9 can't take -- the question is, is it your
10 position he can't take immediate discovery?

11 MR. MUISE: I just don't think there's a
12 need for the immediate discovery as I explained,
13 Your Honor. Now, the opt out --

14 THE COURT: Well, you didn't explain that.
15 I'm having trouble understanding why it doesn't
16 help the court and help the matter move forward
17 if he can't have some immediate discovery. Tell
18 me why they doesn't help.

19 MR. MUISE: Your Honor, again it goes to the
20 point that there isn't the immediacy that it --

21 THE COURT: Well, that may be, but wouldn't
22 the discovery tend to show whether there's
23 immediacy or not? Taking at face value what he
24 says, discovery would seem to allow the board to
25 clarify that for example the immediacy is not

1 present and verify the representation that you
2 made that the immediacy is not present, that we
3 don't have exigent circumstances, and that he
4 ought not try to get, that they ought not try to
5 get a TR0. I'm having trouble understanding why
6 that wouldn't help.

7 MR. MUISE: Certainly, Your Honor, he's
8 entitled to discovery if he wants to have
9 discovery. My point being as they allege in
10 how the policy reads, and part of the policy
11 is also the superintendent's statement, they
12 have to assume that the policy is going to
13 be violated in order for them to make the
14 constitutional claim that they're making.

15 THE COURT: I don't know --

16 MR. MUISE: We have a facial challenge to a
17 particular policy that clearly states what
18 can be taught and what can't be taught in a
19 particular classroom.

20 THE COURT: Well, I don't know that, because
21 I don't know what your position is. See, that
22 again we've drifted off track into the merits,
23 and I don't want to do that, because you have to
24 have a full and complete opportunity, and I want
25 to give you that, you'll have that, to make your

1 answer. So I'm getting piecemeal from you
2 arguments on the merits, and you can do that,
3 but it's not helping me today.

4 What I want to do is try to see where we
5 steer the ship from here. Now, what I'm hearing
6 might militate in favor of allowing some
7 discovery in aid of a determination with respect
8 to a motion for a TR0, reluctant though you may
9 be, and then have a deadline date, for example,
10 for the determination on a motion for a TR0.
11 And then if you file that, it speaks for itself,
12 we'll deal with it.

13 If you don't, then I think my inclination
14 would be to allow you, you've obviously just met
15 and you're just sort of attempting to have some
16 relationship as it relates to this case, allow
17 you to try to come up with your own scenario for
18 how you want the case to proceed. We certainly
19 can set it down consistent with that for a
20 hearing on a preliminary injunction or a
21 combined hearing on the declaratory judgment
22 action and the preliminary injunction, which
23 will allow you the opportunity to file any
24 motions that you may want to file, such as a
25 motion to dismiss, in the interim, and you can

1 set time frames for that, and I'm all for that
2 if you can reach an agreement.

3 If not, we'll impose something on you.
4 But I don't like to do that because you know
5 your cases better than I do. So in the
6 short-run, if for example we were to allow some
7 discovery and then give you a deadline date for
8 your evaluation of whether or not you want to
9 move for a TRO, what would your preferred time
10 frame be?

11 MR. HARVEY: Your Honor, we would like
12 to take some very brief depositions, brief
13 depositions next week, towards the end of next
14 week, and make a decision shortly after the 3rd.
15 They're going to file their answer to our motion
16 to dismiss on the 3rd. I'd like to see what he
17 has to say so we can answer, and then come in
18 and tell the court what our intentions are on or
19 about the 4th or the 5th.

20 That would give us a time to come in here,
21 be heard on arguments, and make a ruling if
22 that's what we decide to do. And if that's not
23 what we decide to do, we will communicate to the
24 court in that same schedule that we've decided
25 that, you know, we're going to just wait until

1 the preliminary injunction hearing, which may be
2 a hearing on the merits.

3 MR. MUISE: Your Honor, I don't think in
4 terms of the answer on January 3rd, the decision
5 to make a TR0 or not make a TR0 shouldn't
6 necessarily rest, ride and fall on how we answer
7 on January 3rd. I would like an extension on
8 that portion, I mean you can have a motion to
9 dismiss that can even be consolidated later down
10 the road with whatever preliminary injunction
11 hearing that we might in fact have in this case,
12 particularly if they're going to be taking
13 discovery --

14 THE COURT: Aren't you --

15 MR. MUISE: -- it appears the court wants to
16 grants, and obviously we would like to also have
17 some opportunity at discovery as well in
18 preparation for this in a similar fashion as
19 the plaintiffs.

20 THE COURT: Tell me as a practical matter
21 what would prevent you from rendering an answer
22 by January 3rd.

23 MR. MUISE: As a practical matter obviously,
24 Your Honor, we can do that if that's what's
25 necessary.

1 THE COURT: Well, the only reason I say that
2 is it seems to me that if you want to go the
3 route and say well, we need an extension and we
4 don't think the answer is going to help them in
5 evaluating whether or not they want to get a
6 TR0, you may be begging more discovery it seems
7 to me, which doesn't make a lot of sense. So
8 there may be things that are revealed in the
9 answer that would cause the plaintiffs not to
10 have to pursue certain inquiries in discovery
11 in their evaluative process. So I'm hard
12 pressed to understand why you wouldn't answer
13 that and then give them the benefit of where you
14 are. And I'm thinking if we set a deadline of
15 January the 5th, what day of the week is that?

16 MR. MUISE: That's a Wednesday, Your Honor.

17 THE COURT: January 5th for the plaintiffs
18 to make a determination as to whether or not
19 they want to move for a TR0, that we open up a
20 discovery period from now until then, that would
21 be the last day for this preliminary discovery,
22 and see where we are. I don't know how much
23 further we can go than that. We can revisit it
24 by even a telephone status call if in fact you
25 determine that you don't want to move for a TR0

1 after that and see where you are, unless you
2 talk in the meantime and you come up with a
3 scenario that you want to suggest to me.

4 MR. HARVEY: And then, Your Honor, and then
5 following that we would also confer with counsel
6 about the preliminary injunction, or whether
7 that's, or the hearing on the merits. In other
8 words, a further hearing down the road.

9 THE COURT: That's what I'm thinking.

10 MR. HARVEY: And if we could work out a
11 schedule, we come to you with an agreed
12 schedule, and if we can't, we present it to
13 you for --

14 THE COURT: Or as an interim step I'm
15 certainly willing to, without assembling
16 everybody, I thought it was fruitful to assemble
17 everybody in person because I wasn't frankly
18 sure what you wanted to do, but I'm only too
19 happy to get counsel by telephone, understanding
20 that you've traveled some great distance, and
21 I'm not going to try to run you unnecessarily
22 back and forth for brief matters, although I
23 think there's a salutary benefit to having
24 everybody together at this early stage of the
25 case, I wouldn't do that lightly, as we move

1 forward from here. So if you have some general
2 ideas about scheduling going forward and you
3 want to get my input on them, we can do that by
4 telephone certainly.

5 MR. MUISE: In terms of the number of
6 depositions for example, Your Honor, is there
7 any sort of limitation that we'd want to put on?
8 Obviously we've got the holidays coming up here
9 and there's something that at least we can
10 advise clients about who needs to be around and
11 that sort of thing, is there in terms of what
12 the court, or do you just want to leave it to
13 the counsel --

14 THE COURT: Do you have a sense who you want
15 to depose?

16 MR. HARVEY: Yes, Your Honor. I have a
17 sense that I want to depose the current board
18 president, the immediate past board president,
19 the chairman of the curriculum committee, and
20 superintendent of the schools.

21 MR. MUISE: We can work out those --

22 THE COURT: Sounds like four.

23 MR. MUISE: Four.

24 MR. HARVEY: That's correct, Your Honor.

25 THE COURT: Are you going to serve any

1 interrogatories, or are you just going to do
2 depositions?

3 MR. HARVEY: I wasn't go to serve
4 interrogatories, Your Honor. I was planning
5 on serving document requests in the near future,
6 but it would be due unless we agreed on, it
7 wouldn't be due in the interim unless Your Honor
8 ordered them or we agreed on them. So I think
9 I would ask if there's any particular document
10 that we want I'd ask counsel to produce them if
11 we feel we need them prior to the deposition
12 that we are agreeable, we will post Your Honor
13 if necessary.

14 THE COURT: Well, my standard procedure in
15 all cases where there's a discovery dispute is
16 for you to contact my chambers, and you would be
17 more aware of this than you would be aware of
18 this obviously, and attempt to have me mediate
19 a discovery dispute. So I think rather than
20 become too precise, why don't we say that the
21 depositions would be not to exceed -- the
22 depositions would be four, not to exceed four.

23 MR. HARVEY: Yes, Your Honor.

24 THE COURT: And if you couldn't agree, if
25 you needed five and you couldn't agree on five,

1 you'd contact me and we'd try to mediate that.
2 If you need documents and you can't agree on
3 documents, you contact me and we can mediate on
4 that. I'll leave you to your own designs
5 otherwise. The discovery period for the four
6 depositions and whatever else you need to do,
7 without being specific, would conclude, it would
8 commence as we leave here today.

9 It would conclude at the close of business
10 on January the 5th of 2005, and with that elapse
11 no later than the end of that business day on
12 January 5th, the plaintiffs' counsel will advise
13 the court as to whether or not -- well, you
14 don't have to advise the court. The filing
15 advises the court. Obviously you will file a
16 motion if you are intending to do so, your
17 deadline would be that same day.

18 MR. HARVEY: Yes, Your Honor.

19 THE COURT: Is that acceptable to the
20 plaintiffs?

21 MR. HARVEY: That is acceptable, Your Honor.

22 THE COURT: Is that acceptable to the
23 defendants?

24 MR. MUISE: Yes, Your Honor. In terms of
25 response, the deadline obviously is going to be

1 sort of truncated if we're kind of looking at
2 the 13th as being the date for plaintiffs'
3 counsel, defense counsel would like at least
4 a week to respond, but that puts us, you know,
5 the day before obviously.

6 THE COURT: Yes, and it's somewhat
7 problematic for me as well, because I have
8 trials in January and I just don't know, I'll
9 do the level best that I can, but you shouldn't
10 fear that you're going to be yanked into a
11 hearing the day after the motion for a TRO is
12 filed, because my schedule wouldn't permit that
13 in any event. So you'll have time, and if we
14 again have to get you by telephone conference,
15 if and when a motion for a TRO is filed, in
16 order to try to set some deadlines and check
17 schedules.

18 I'm reluctant in this busy practice that
19 all of you have to drop mandates in some sort of
20 draconian fashion that you'll be at such and
21 such a place at such and such a time when you
22 may be attached some place else, and I'm not
23 unsympathetic to that, and we'll try to work
24 with you, understanding that it's going to be a
25 short time frame and we're going to have to all

1 try to find time in our schedule to do it, if
2 and when that happens.

3 MR. MUISE: It's my understanding, Your
4 Honor, in terms of they file their motion on
5 the 5th, we should proceed under what the
6 standard rules offer response time, barring some
7 conference to truncate that in some fashion that
8 meets the schedule?

9 THE COURT: I guess -- and my answer was
10 imprecise, and I apologize for that. I guess
11 if a motion for a TRO is filed, probably what
12 that will likely trigger is an outreach from
13 my deputy almost immediately to check your
14 schedules, and then we can sort of clarify what
15 those deadlines are, without being too precise
16 here, because I just don't know. And I know
17 that I have trials scheduled, and likely I would
18 have to interrupt a trial to do this. So let's
19 not go too far out and speculate in areas that
20 we just can't at this point. Tell me what else
21 we can cover today.

22 MR. HARVEY: Your Honor, I don't -- I'm
23 hopeful that we can work out the, understanding
24 exactly what the court has said on the TRO, I'm
25 hopeful we can work out a briefing schedule for

1 the remainder of the case that's mutually
2 acceptable. The only other thing I wanted to
3 point out to you is that my colleague and
4 partner, and Tom Schmidt's colleague and
5 partner, Eric Rothschild, will be really serving
6 as lead counsel. You'll a lot of us in this
7 case, but just so next we're here and you see
8 him and I'm sitting there, you'll know why.

9 THE COURT: You're going to pass the baton?

10 MR. HARVEY: No, Your Honor. He has been
11 sort of our lead counsel going forth and he's
12 on a well deserved vacation this week.

13 THE COURT: I'll certainly allow for that.
14 Anything else from the defendants' perspective?

15 MR. MUISE: No, Your Honor. Just as well we
16 have another attorney, Patrick Gillen, as well
17 who will be making an appearance, who's actually
18 in Massachusetts on a case presently. So you
19 will see another face involved in this matter
20 as well.

21 THE COURT: Well, we have plenty of counsel
22 in this case, that's obvious, a lot of legal
23 talent. That can be good, but sometimes that
24 can be difficult when we arrange everybody's
25 schedules. But we'll do the best that we can.

1 At least we can, you lose the argument that
2 there's nobody available the more counsel you
3 have on each side.

4 MR. HARVEY: I understand, Your Honor.

5 THE COURT: So hopefully we'll be able to
6 work through that in this case. I would urge
7 you to do the obvious, and you're experienced
8 counsel, so you know this, but that would be
9 to use the time, although this proceeding is
10 brief, to use the time today that you may have
11 to chat in the cordial vein that you've
12 addressed everything else in this case and
13 see what you can work out, particularly with
14 respect to scheduling, depositions, because what
15 I don't want to get, unless I have to, is a
16 phone call saying that, you know, someone,
17 you've only got limited time to depose people
18 and somebody can't be available.

19 So try to, we do have the holidays
20 impending, and that can make it difficult, but
21 I know you'll work in the spirit of cooperation
22 and try to make these folks available as well.
23 It's difficult, I know, and people have busy
24 lives as the year ends and the holidays are
25 upon us. So I wish you luck in that regard.

1 I'll produce an order that memorializes this
2 as far as we can go with it, and then we'll be
3 back together at some point one way or another.

4 MR. HARVEY: Thank you, Your Honor.

5 THE COURT: Anything further?

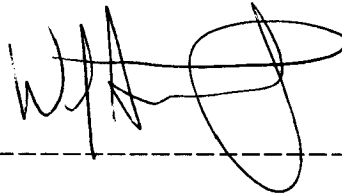
6 MR. MUISE: No, Your Honor.

7 THE COURT: All right. We'll close the
8 record for today, and we'll wait to hear from
9 you, all right? Thank you.

10 (Court was adjourned at 1:37 p.m.)
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Tammy Kitzmiller vs. Dover Area School District
Scheduling Conference
21 December 2004

I hereby certify that the proceedings
and evidence are contained fully and accurately
in the notes taken by me on the trial of the
above cause, and that this copy is a correct
transcript of the same.

A handwritten signature in black ink, appearing to read 'WJ Armstrong', is written over a horizontal dashed line.

Wesley J. Armstrong

Registered Merit Reporter

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